

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Biennial Regulatory Review - Elimination)
 or Streamlining of Unnecessary and)
 Obsolete CMRS Regulations)
)
 Forbearance from Applying Provisions of)
 the Communications Act to Wireless)
 Telecommunications Carriers)

WT Docket No. 98-100

COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the Commission's *Notice of Proposed Rulemaking* ("NPRM") in the above-referenced proceeding.^{1/} For the reasons discussed herein, the Commission must forbear from imposing regulations on fixed wireless telecommunications carriers and, more generally, should use the opportunity afforded by the *NPRM* to adopt a procompetitive, deregulatory policy for fixed wireless broadband telecommunications carriers.

I. BACKGROUND

WCA is the principal trade association of the fixed wireless broadband communications industry. Its membership includes a wide variety of companies interested in the deployment of spectrum at 2.1 GHz, 2.3 GHz, 2.5 GHz, 18 GHz, 24 GHz, 31 GHz and 38 GHz allocated to the

^{1/} *Biennial Regulatory Review - Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations, Forbearance from Applying Provision of the Communications Act to Wireless Telecommunications Carriers, Notice of Proposed Rulemaking*, WT Docket No. 98-100, FCC 98-134 (rel. July 2, 1998).

Multipoint Distribution Service ("MDS"), Wireless Communications Service ("WCS"), Instructional Television Fixed Service ("ITFS"), Digital Electronic Message Service ("DEMS"), Local Multipoint Distribution Service ("LMDS"), and Part 101 point-to-point microwave services for the provision of fixed wireless broadband telecommunications services. WCA's members include Commission licensees, wireless broadband telecommunications system operators and equipment manufacturers. Thus, the Commission's exercise of its Section 10 forbearance authority under Section 10 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "1996 Act") is of tremendous importance to WCA's members and to providers of fixed wireless broadband telecommunications services generally.

With the *NPRM*, the Commission has requested comment "regarding forbearance from applying any regulation or provision of the Act to wireless telecommunications carriers licensed by the Commission."^{2/} The Commission to date has addressed forbearance for wireless carriers primarily in the CMRS context.^{3/} Nevertheless, WCA applauds the Commission for its apparent recognition that the *NPRM* affords an opportunity to establish a pro-competitive, deregulatory framework for the regulation of fixed wireless broadband telecommunications services as well. As the Commission has recently acknowledged, "[t]he broadband fixed wireless industry has the

^{2/} *Id.* ¶ 112.

^{3/} See, e.g., *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*, Notice of Proposed Rule Making, 9 FCC Rcd. 2164 (1994), proceeding terminated, *NPRM* ¶ 112; *Personal Communications Industry Ass'n's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Public Notice, 12 FCC Rcd. 7637 (1997), granted in part, denied in part, Memorandum Opinion and Order, FCC 98-134 (rel. July 2, 1998).

potential to present major competition to the wireline telecommunication companies in the local loop” and that some licensees are using or may use their spectrum “to offer the last mile and backbone” for advanced services.^{4/} Indeed, in enacting the 1996 Act, Congress recognized wireless carriers’ potential contribution to local competition.^{5/} The Commission has also noted, however, that the industry is “in an early stage of development” and that regulatory barriers may exist “to greater, more widespread deployment of high-bandwidth wireless systems.”^{6/} As discussed herein, both the 1996 Act and Commission precedent support the exercise of Section 10 forbearance as a means of fulfilling Congress’ intent and facilitating fixed wireless entry into the local exchange and other telecommunications markets.

^{4/} *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Third Report*, FCC 98-91, at App. F, F-10 (rel. June 11, 1998) (“*Third CMRS Competition Report*”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, Notice of Inquiry*, CC Docket No. 98-146, FCC 98-187, ¶ 42 (rel. Aug. 7, 1998) (“*Advanced Services NOI*”).

^{5/} See 47 U.S.C. §§ 153(26) (authorizing Commission to classify commercial mobile service provider as “local exchange carrier”), 332(c)(7)(C)(i) (defining “personal wireless services” to include “common carrier wireless exchange access services”); see also H.R. Conf. Rep. No. 104-458, at 209 (1996) (facilities siting provisions of Section 332(c)(7) apply to “wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum”); *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Louisiana, Memorandum Opinion and Order*, 11 Comm. Reg. (P&F) 328, ¶ 72 (rel. Feb. 4, 1998) (interpreting Section 271(c)(1)(A) to not preclude PCS from being considered “facilities-based competitors” to BOCs).

^{6/} *Third CMRS Competition Report* at F-10; *Advanced Services NOI* ¶ 43.

II. DISCUSSION

A. *Section 10 Requires the Commission to Extend Forbearance to Wireless Carriers Other Than Those Classified as CMRS*

The *NPRM* inquires “whether [the Commission] should extend any forbearance pursuant to Section 10 to wireless carriers other than those classified as CMRS. . . .”^{7/} WCA submits that Section 10 expressly answers this question in the affirmative and, indeed, *mandates* that the Commission extend forbearance to fixed wireless telecommunications carriers.

Where the conditions of Sections 10(a)(1)-(3) are met, “the Commission *shall forbear* from applying *any* regulation or any provision of this Act to a *telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services*, in any or some of its or their geographic markets.”^{8/} Congress’ use of “shall” affords the Commission no discretion. Simply put, *any* wireless telecommunications carrier — mobile or fixed — is entitled to forbearance where Section 10 criteria are met. The Commission itself noted that such carriers may include fixed wireless licensees under Part 21 and Part 101 and, indeed, the Commission has *already* applied Section 10 forbearance to Part 27 and Part 101 licensees.^{9/}

^{7/} *NPRM* ¶ 114.

^{8/} 47 U.S.C. § 160(a) (emphasis added). A telecommunications carrier, in turn, is defined as “any provider of telecommunications services. . . .” *Id.* § 153(44) (emphasis added).

^{9/} *NPRM* ¶ 112; see *Federal Communications Bar Ass’n’s Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers and PCIA’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for* (continued...)

B. Section 10 Forbearance for Fixed Wireless Services Will Promote Competition in the Local Exchange Market

The pro-competitive, deregulatory policy underlying Section 10 and the Commission's Section 10 precedent is simple: in competitive telecommunications services markets, or where a carrier has no market power, it is market forces, and not regulatory fiat, that promotes just, reasonable and nondiscriminatory rates and practices, protects consumers, and advances the public interest. Section 10 provides that the Commission must forbear from enforcing any statutory provision or regulation for any class of fixed wireless telecommunications carriers if the objectives enumerated at Sections 10(a)(1)-(3) are met.^{10/} Where competition and fixed wireless carriers' lack of market power is sufficient to meet these objectives, forbearance is mandated.

As fixed wireless telecommunications carriers are new entrants with no market power and, at most, *de minimis* market share, Commission precedent warrants a presumption of forbearance for these services. Any fixed wireless licensees utilizing their facilities to provide local services will be providing such services on a nondominant basis.^{11/} First, the Commission has already determined that such entities currently have a relatively small market share in the provision of local exchange and exchange access service" and that "non-[ILECs] should be

^{9/} (...continued)

Broadband Personal Communications Services, Memorandum Opinion and Order, FCC 98-18, ¶ 24 (rel. Feb. 4, 1998) (codified at 47 C.F.R. §§ 27.324(a)(3), 101.53(a)(1) (WCS and common carrier point-to-point microwave services, respectively).

^{10/} 47 U.S.C. §§ 160(a)-(b).

^{11/} See *Advanced Services NOI* ¶ 29 (CLECs "generally possess no market power").

treated as nondominant in the provision of terminating access.”^{12/} For that reason, the Commission determined to “not adopt at this time *any regulations* governing the provision of terminating access provided by [CLECs].”^{13/} For similar reasons, the Commission exercised its Section 10 authority to forbear from enforcing mandatory access tariffing for CLEC providers of interstate exchange access services.^{14/}

Furthermore, a number of recent Commission policies and actions ensure that, for the foreseeable future, there will be enormous variety and customer choices for fixed wireless services. The Commission has made enormous amounts of bandwidth available for fixed wireless telecommunications services in recent years.^{15/} In addition, CMRS licensees, many of

^{12/} See *Access Charge Reform/Price Cap Performance Review For Local Exchange Carriers/Transport Rate Structure And Pricing/End User Common Line Charges, First Report and Order*, 12 FCC Rcd 15982, ¶¶ 360-61 (1997).

^{13/} *Id.* ¶ 363 (emphasis added).

^{14/} See *Hyperion Telecommunications, Inc., Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 8596, ¶¶ 23-29 (1997)

^{15/} See, e.g., *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545, 12636-39 (authorizing LMDS licensees to provide telecommunications services); *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the MDS and ITFS, Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Report and Order*, 10 FCC Rcd. 9589, 9619, App. D (1995) (authorizing MDS to select either common carrier or non-common carrier regulatory status); *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate international Satellite Systems, Report and Order*, 11 FCC Rcd. 2429, 2436 (1996) (authorizing fixed satellite service systems to select either common carrier or non-common carrier regulatory status).

which are established cellular and PCS companies, are authorized to provide fixed services on their CMRS frequencies on a co-primary basis.^{16/}

In light of this precedent and these recent licensing actions, the Commission should approach all Section 10 proceedings relevant to fixed wireless telecommunications services, and all future regulation of such services, under the presumption that carriers providing these services have no market power. Only if there is a strong public interest basis may a regulation be imposed on these services under Section 10.

C. Regulatory Symmetry Between Nondominant Telecommunications Carriers Will Generally Serve the Public Interest

The Commission has requested commenting parties to address “how forbearance for particular types of providers would comport with the goal of regulatory symmetry, bearing in mind that our forbearance authority permits different regulation of different providers” and “whether limiting forbearance to only some CMRS or other wireless telecommunications carriers would undermine regulatory symmetry and the regulatory scheme established” for CMRS providers.^{17/} WCA submits that the Commission’s Section 10 forbearance authority provides adequate flexibility for the Commission to account for issues of “regulatory symmetry,” where the public interest so requires.^{18/} In this regard, the Commission already imposes varying

^{16/} 47 C.F.R. §§ 22.901(d), 24.3; *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd. 8965 (1996).

^{17/} *NPRM* ¶ 112.

^{18/} *See* 47 U.S.C. § 160(a)(3).

degrees of regulation on telecommunications carriers based on a number of factors. As noted earlier, for example, the Commission imposes differential regulation on telecommunications carriers based on their market power.^{19/} As discussed below, however, regulatory symmetry between different classes of nondominant wireless carriers will generally promote competition and further the public interest.

D. The Commission Should Forbear from Applying Title II Provisions Premised on a Carrier's Market Power and Should Ensure that Future Regulations do not Unnecessarily Burden Fixed Wireless Telecommunications Carriers

WCA submits that the Commission should, at minimum, forbear from imposing those Title II provisions on fixed wireless telecommunications carriers that it already forbears from applying to CMRS licensees (to the extent that those provisions apply to fixed wireless licensees). Under its Section 332(c)(3) forbearance authority, the Commission determined:

In a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower costs.^{20/}

For these reasons, the Commission decided to forbear from enforcing Sections 203, 204, 205, 211 and 214 on CMRS providers — *notwithstanding* its conclusion that some CMRS licensees,

^{19/} See notes 11-16 *supra* and accompanying text; see also 47 C.F.R. §§ 61.20, 63.07 (imposing less stringent tariffing and Section 214 requirements on nondominant carriers).

^{20/} *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services, Second Report and Order*, 9 FCC Rcd. 1411, 1478 (1994).

at the time, exercised market power.^{21/} Fixed wireless telecommunications carriers, in contrast, are new market entrants and exercise *no* market power.^{22/} Thus, the Commission's basis for forbearance in the CMRS context requires the Commission to forbear from applying these provisions to fixed wireless telecommunications carriers.^{23/}

Finally, WCA urges the Commission to account for the Section 10 factors as new regulations are proposed *in the future*. The Commission has previously determined that "when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets" it may be necessary "to consider carefully whether, pursuant to [its] authority under section 10 of the Act, to forbear from imposing any of the rules" that would apply to telecommunications carriers.^{24/} As a general proposition, the Commission should be reluctant to impose burdensome and unnecessary regulation on emerging fixed wireless broadband service providers.

^{21/} *Id.* at 1467, 1478-1481.

^{22/} See notes 11-16 *supra* and accompanying text.

^{23/} Furthermore, there are a number of pending Section 10 petitions that may be of relevance to fixed wireless telecommunications carriers. A number of parties have petitioned the Commission to forbear from imposing certain of its CPNI rules on telecommunications carriers (CC Docket No. 96-115). Similarly, a number of wireless carriers have petitioned for forbearance from imposing Section 254(g)'s rate integration requirement on CMRS providers (CC Docket No. 96-61). A number of the issues raised in those petitions may be relevant to fixed wireless carriers as well.

^{24/} See *Federal-State Joint Board on Universal Service, Report to Congress*, CC Docket No. 96-45, FCC 98-67, ¶¶ 90-92 (released Apr. 10, 1998).

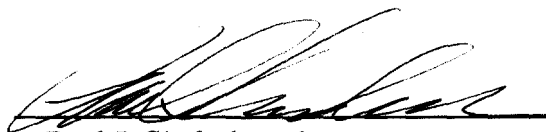
III. CONCLUSION

For the reasons discussed herein, (1) the Commission must forbear from enforcing statutory or regulatory requirements against fixed wireless telecommunications carriers when the Section 10 criteria are met; (2) the Commission should adopt a presumption in favor of forbearance for providers of fixed wireless telecommunications services; (3) regulatory symmetry as between nondominant carriers is a legitimate consideration under Section 10's public interest prong; and (4) the Commission should aggressively forbear from applying existing statutory and regulatory burdens on fixed wireless telecommunications carriers.

Respectfully submitted,

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